

Bell Atlantic
1300 I Street, Suite 400W
Washington, DC 20005
202 336-7888 Fax 202 336-7922
E-Mail: susanne.a.guyer@BellAtlantic.com

Susanne Guyer
Assistant Vice President
Federal Regulatory

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 12, 1999

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

**Re: CC Docket 98-147, Deployment of Wireline Services Offering
Advanced Telecommunications Capability**

Dear Ms. Salas:

Yesterday, Mr. E. Young, III, Mr. G. Evans, Mr. J. Pachulski, and I, representing Bell Atlantic, and Mr. S. Teplitz, representing America OnLine, met with Mr. L. Strickling, Chief of the Common Carrier Bureau, Mr. R. Atkinson, Ms. J. Jackson, Mr. M. Pryor and Mr. D. Stockdale of the Common Carrier Bureau. The purpose of the meeting was to explain Bell Atlantic's position that xDSL services that are offered on a wholesale basis to Internet Service Providers and other carriers for resale are not subject to a wholesale discount under Section 251(c)(4) of the Act.

The Bell Atlantic representatives during the meeting used the attached paper as a basis for discussion.

In accordance with Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this notice are being submitted to the Secretary.

Sincerely,

A handwritten signature in cursive script that reads "Susanne Guyer".
Susanne Guyer

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List A B C D E

attachment

cc: L. Strickling
R. Atkinson
J. Jackson
M. Pryor
D. Stockdale

The Wholesale Discount Requirement In 251(c)(4) Of The Act Should Not Apply To Wholesale Offerings of xDSL Service

The Commission should confirm that xDSL services that are offered on a wholesale basis to Internet Service Providers and other carriers for resale are not subject to a wholesale discount under Section 251(c)(4) of the Act. This is true both for reasons of law and of sound public policy.

First, as a legal matter, the Section 251(c)(4) discount applies only to services that are provided “at retail” to “subscribers” of those services. The xDSL services provided to ISPs and other carriers, however, will be used as an input to their own retail Internet services and resold to their own subscribers. By definition, services that are provided for resale are not “retail” services, and are not, in common telecommunications parlance, provided to the ultimate “subscribers.” Moreover, the Commission already has concluded, in the context of exchange access service, that a service is not a retail service subject to Section 251(c)(4) where it predominantly is provided to entities that resell the service as part of their own retail product.

Second, as a policy matter, imposing a wholesale discount requirement on wholesale xDSL services would make it impossible to provide ISPs the lowest possible price. If any price made available to ISPs, no matter how deeply discounted, automatically would have to be available at a further 20 percent discount, the simple fact is that carriers will be unable to offer ISPs a price that is as low as they otherwise could. Ironically, the ultimate effect of such a requirement will be higher prices for ISPs and their customers, and slower deployment of high speed services to the home -- all directly contrary to the FCC’s policy objectives. And it would put ISPs (such as AOL) that are not affiliated with a carrier, and are unable to take advantage of a wholesale discount, in the untenable position of being unable to compete with ISPs (such as UUNet) that are affiliated with a carrier.

1. Wholesale xDSL services provided predominantly to ISPs for resale are not “retail” services subject to a wholesale discount. Under the express terms of the Act, a wholesale discount requirement applies only to telecommunications services that a “carrier provides *at retail* to *subscribers* who are not telecommunications carriers.” 47

U.S.C. § 251(c)(4)(A) (emphasis added). By definition, however, an xDSL service that is provided to ISPs for resale to their own subscribers is a *wholesale* service and is not being provided “at retail,” as required by the Act. Likewise, when ISPs purchase xDSL service for resale, they are not, in any common sense use of the term, a “subscriber” of that service, which typically refers to the end user of the service. Under the express terms of Section 251(c)(4), therefore, xDSL services provided to ISPs for resale are not subject to a wholesale discount.

Moreover, the provision of the Act that defines the standard for establishing a wholesale discount also makes clear that a “retail” service is one that a local exchange carrier provides to end users, and for which it performs the “marketing, billing, collection, and other” retailing functions necessary to do so. 47 U.S.C. § 252(d)(3). Indeed, the Commission itself has acknowledged that “Congress clearly intended Section 251(c)(4) to apply to services targeted to *end user* subscribers, because only those services involve an appreciable level of *avoided costs* that could be used to generate a wholesale rate.”

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 15931 at ¶ 874 (1996) (“*Local Competition Order*”)(emphasis added).¹ But when xDSL services are provided to ISPs for resale, it is the ISPs that sell the service to end user subscribers, and it is the ISPs that perform the marketing and other retailing functions contemplated by the Act.

Lest there were any doubt, however, the Commission itself previously addressed the same fundamental question at issue here. In the *Local Competition Order*, the Commission concluded, in the context of exchange access services, that when a service is

¹ Some may argue that ISPs qualify as “subscribers” under the so-called “enhanced service provider exemption.” They are wrong. As the Commission has made clear, that exemption merely allows ISPs to be treated as though they were “end users” solely “for purposes of applying access charges.” *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, n. 8 (1988). The FCC’s decision to *treat* enhanced service providers as if they were end users in order to exempt them from paying access charges does not mean these entities actually *are* end users or that they are “subscribers” for purposes of Section 251(c)(4). In fact, the Commission has recognized that enhanced service providers function more like carriers by noting that, absent the exemption, “facilities based carriers, resellers, ... sharers, privately owned systems, enhanced service providers, and other private line and WATS customers,” all would be subject to interstate access charges. *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 78 (1983).

provided predominantly to another entity to resell to end user subscribers as part of its own retail service, the wholesale discount does not apply. This is true, moreover, despite the fact that exchange access services also are (and under the FCC's rules must be) made available for purchase by end user customers as well as by carriers. As the Commission itself put it, however, "these services, are *predominantly* offered to, and taken by, IXC's, *not end users*." *Local Competition Order* at ¶ 874 (emphasis added). As a result, according to the Commission, "access services are designed for, and sold to, IXC's as an input component to the IXC's own retail services." *Id.*

The same is true, of course, of wholesale xDSL services that predominantly are provided to ISPs for resale. Like exchange access services, wholesale xDSL arrangements predominantly will be offered to and taken by subscribers that are not end users (i.e. ISPs and other carriers). Like exchange access services, wholesale xDSL will be sold as an input to ISPs' and carriers' own retail services. And like exchange access services, ISPs will perform the retail-related functions when they sell xDSL service to their own end users.

Moreover, while this is true of any xDSL service that is provided predominantly to ISPs or others for resale, it is especially true of the type of bulk offerings that Bell Atlantic (and perhaps others) soon will tariff. These offerings specifically are designed for high volume purchasers of xDSL services, and are designed for use predominantly -- if not exclusively -- by ISPs and others (including other carriers) to purchase as an input to their own retail Internet services. Indeed, they involve the types of volumes that, as a practical matter, only can be used by entities that intend to resell the service to many separate retail customers. At a minimum, therefore, these types of bulk offerings -- which already are deeply discounted -- cannot lawfully be subjected to a further wholesale discount requirement under the express terms of the Act and the Commission's orders.

2. Applying a wholesale discount requirement to wholesale xDSL offerings would be contrary to sound public policy. Imposing a wholesale discount requirement on wholesale xDSL services provided to ISPs and others also would undermine the Commission's own public policy objectives.

Under these circumstances, imposing a wholesale discount would result in consumers paying more for advanced services they purchase from ISPs, and, by doing so, slow the widespread deployment of advanced services to all Americans. This is so for the simple reason that applying a wholesale discount to these services will effectively undermine the incentive that carriers otherwise would have to offer ISPs the lowest possible price for these services in order to promote their widespread adoption by consumers. In other words, carriers simply cannot afford to offer ISPs as low a price as they would otherwise if they know that they are at risk of automatically having to sell those services at a further discount of 20 percent (or more). And the risk is real. To date, states typically have applied a uniform discount to all services regardless of the level of costs that will actually be avoided in the case of that particular service (if any). Consequently, ISPs will pay higher prices for xDSL services that ultimately will be passed through to consumers.

In addition, it simply makes no policy sense to create a situation in which ISPs that are affiliated with a carrier can purchase xDSL services for resale at a lower price than ISPs who are not affiliated with a carrier. Both will perform the same functions. Both will purchase the service, resell it to retail customers and perform various retail-related functions. Yet the ISP that is not affiliated with a carrier will be put in the untenable position of having an artificial, regulatorily-created cost disadvantage compared to its competitor.

For all these reasons, the Commission should confirm that xDSL services that are provided predominantly to ISPs or other carriers for resale are not subject to a wholesale discount under Section 251(c)(4) of the Act.